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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE* AND MOTION FOR LEAVE TO FILE THE BRIEF

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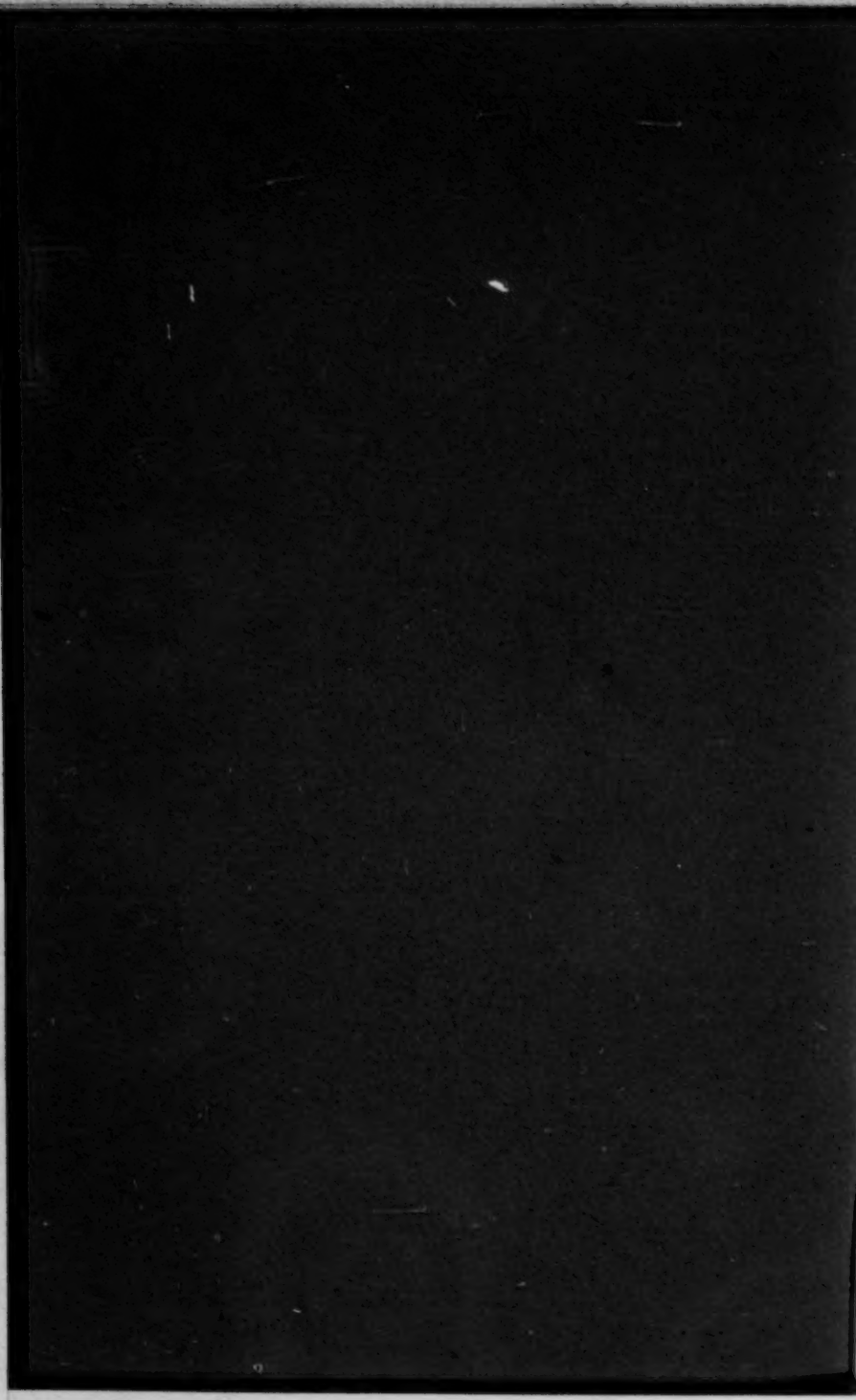

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Leave to File Brief *Amicus Curiae*

The City of New York respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the parties in the case is not needed because the brief is to be presented by the Corporation Counsel of the City of New York who is the authorized law officer of the City of New York, a political subdivision of the State of New York (Supreme Court Rules, Rule 42, subd. 4).

Motion for Leave to File Brief Amicus Curiae

The interest of the City of New York in this case arises from the fact that it is a party defendant in an analogous case presently pending in the United States District Court for the Southern District of New York in which the same issue will have to be decided, *i.e.* whether a diversity action will be allowed to proceed as a class action under Fed. R. Civ. Proc. 23, when the named plaintiffs meet the jurisdictional amount requirements of 28 U. S. C. A. 1332 but some other unnamed members of the class do not.

It is believed that the brief which the City of New York as *amicus curiae* is requesting permission to file will provide factual information which may be of help to the Court in the deliberation upon the issue before the Court.

Dated: May 1, 1973

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

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INTERNATIONAL PAPER COMPANY,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

The Interest of the City of New York

The interest of the City of New York in this case arises from the fact that it is a party defendant in an analogous case presently pending in the United States District Court

for the Southern District of New York (Docket No. 71 Civ. 5568, C. L. B., Jr.), brought against the City of New York by Lloyd F. Canfield and Eloise L. Canfield on behalf of themselves and others similarly situated. In the *Canfield* case, the same issue will have to be decided by the District Court, whether a diversity action will be allowed to proceed as a class action under Fed. R. Civ. Proc. 23 when the named plaintiffs meet the jurisdictional requirements of 28 U. S. C. A. 1332, but some other unnamed members of the class do not.

The Argument

The City of New York joins the International Paper Company, respondent herein, in urging affirmance of the lower court decisions.

In so doing, the City relies upon the legal argument of the counsel for the respondent. It submits that the conclusions, and the reasons supporting them, of the late Hon. Bernard J. Leddy, in his opinion and decision reported in 53 F. R. D. 430 (D. Vt., 1971), are sound and logical.

To indicate why the decision of the District Court and the affirmance thereof by the Court of Appeals in the *Zahn* case are sound, we wish to inform this Court of the facts and circumstances the City of New York is now confronted in an analogous case brought against the City as a spurious class action on behalf of "thousands" of owners of land riparian to the Delaware River.

By virtue of the authority and direction given to the City of New York by this Court in the decisions and decrees in *New Jersey* v. *New York*, 283 U. S. 336 (1931) and 347 U. S. 995 (1954), and in compliance therewith, the City of New York has been diverting certain amount of waters from the upper reaches of the Delaware River

in the Catskill Mountains within the State of New York for its water supply for the inhabitants of the City of New York.

The water diversions and the damages alleged to have been caused thereby are the subject matter of the diversity case brought against the City by Lloyd F. Canfield and Eloise L. Canfield, owners of land in Pennsylvania riparian to the Delaware River, on behalf of themselves and of "a class . . . consisting of all other owners of water rights and riparian lands in the States of Pennsylvania, New Jersey and Delaware, downstream on the Delaware River from the Downsville and Cannonsville Dams, who have suffered damages" as a result of interference with the flow of the Delaware River by the City of New York. The complaint alleges that "the individuals in the class number in the thousands." While the claim of the named plaintiffs in the *Canfield* case meets the jurisdictional requirements as to the amount in controversy, it is unlikely that the property of each and every riparian owner on the Delaware River, alleged to be in the "thousands", is valued at $10,000, and, to a legal certainty, it is not credible that every such owner has suffered damages in excess of $10,000.

In the *Canfield* class action, now pending in the United States District Court for the Southern District of New York, the question as to whether or not each class member must independently satisfy the requirement as to the jurisdictional amount has not been raised as yet, and the action is now "dormant" while all of the parties await the outcome of the instant appeal. The outcome of the *Zahn* case will control the future decision of the District Court in the *Canfield* case on the issue of jurisdiction over the members of a class who do not satisfy the monetary requirement.

One of the differences between these two cases is that in the *Zahn* case the class consists of several hundred owners of land on a lake, whereas in the *Canfield* case the alleged class consists of several "thousands" of owners of land on the Delaware River, in three states, on the shores of 500 miles of the river as it winds and turns. In the *Zahn* case, the damages to the property owners are alleged to have been caused by the respondent therein, the International Paper Co., polluting the water of a lake, whereas in the *Canfield* case the damages to the riparian land owners are alleged to have been caused by the defendant, the City of New York, diverting some of the waters of the Delaware River for the purpose of a municipal water supply.

In the event of a reversal in this case, the United States District Court for the Southern District of New York apparently will be vested with jurisdiction over the "thousands" of unnamed owners of riparian or other water rights in areas from Pennsylvania through New Jersey and Delaware to the ocean, regardless of the amount of their individual, separate and distinct claims. Also, in the event of a reversal, the United States District Court for the Southern District of New York would be, for all practical purposes, flooded by "thousands" of separate trials by each of the "thousands" of riparian owners of land on the Delaware River under the legal sanction of a so-called "class action", regardless of the amount of their individual, separate and distinct claims. The trials will require determinations with respect to whether, under the circumstances, there is liability on the part of the City of New York and, in each case, it will be necessary to determine the extent and the amount of damages.

CONCLUSION

The order appealed from should be affirmed in all respects.

May 1, 1973

Respectfully submitted,

NORMAN REDLICH,
Corporation Counsel of the City of New York,
Attorney for the City of New York as Amicus Curiae.

STANLEY BUCHSBAUM,
ANTONIN TUTTER,
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